PUBLIC VERSION

ORIGINAL

Before the
UNITED STATES COPYRIGHT ROYALTY BOARD
Library of Congress
Washington, D.C.

In the Matter of	)	
Determination of Royalty Rates for Satellite Radio and "Preexisting" Subscription Services (SDARS III)	)	**Docket No. 16-CRB-0001-SR/PSSR (2018–2022)**

SEP

Received

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GEORGE JOHNSON'S (GEO) OBJECTION AND MOTION TO DISMISS OR DENY THE SERVICES' MOTION TO DISMISS GEO FROM THIS PROCEEDING

George D. Johnson ("GEO"), an individual §114 copyright owner-author, non-attorney *pro se*, respectfully submits the following Objection and Motion to Dismiss or Deny the Services' Motion To Dismiss GEO From This Proceeding, in the above captioned proceeding. The Services consist of Sirius XM Radio Inc. ("SiriusXM") and Music Choice (both, together with withdrawn participant Muzak LLC, the "Services"). GEO is the creator and owner of multiple master sound recordings[1] in analog and digital, protected by the Copyright Act under §106 and §114 (affected §115 works), therefore has a "significant interest" in this proceeding. GEO respectfully requests Your Honors Dismiss or Deny the Services Motion to Dismiss GEO.

BACKGROUND

On September 15, 2016, Sirius XM Radio Inc. ("SiriusXM") and Music Choice (both, together with withdrawn participant Muzak LLC, the "Services") filed a motion to dismiss GEO from this proceeding based on the Services' claim that:

[1] https://itunes.apple.com/us/artist/george-johnson/id2983224 GEO's §114 master sound recordings and underlying works licensed under a direct deal with Apple iTunes for over 5 years.

1.) All 3 Services will now *deny GEO any deal* with each of these Services in SDARS

2.) "GEO lacks the "significant interest" required to participate in this proceeding, and dismissal is proper."

As Your Honors are aware, GEO participated and completed the entire two year *Web IV* rate proceeding under §114 and is now an appellant in the United States Court Of Appeals, D.C. District (Case No. 16-1162, 16-1159 combined). GEO is also participating in Phonorecords III.

Your Honors kindly wrote in your *Web IV* Final Determination, March 4, 2016, that "Mr. Johnson eloquently stated the plight of the singer-songwriter-artist who is self-published and produced. He also proposes an overarching reform to the way in which right owners of music—written, published, performed, broadcast—would be paid for their artistic creations. The current law thoroughly segments both the copyrights and the licensing mechanisms."

Once again, like in *Web IV*, GEO would *be the only individual representing the pro-copyright interests of an actual copyright owner, creator, investor, and performer themselves*, not through counsel or as a lobbying trade association or collector of royalties.

Pursuant to §801(b)(1)(A) to (C), some of the functions of the Copyright Royalty Judges shall be "to achieve the following objectives": to "maximize the availability of creative works to the public", "to afford the copyright owner a fair return for his or her creative work and the copyright user a fair income under existing economic conditions", and "to reflect the relative roles of the copyright owner and the copyright user in the product made available to the public with respect to relative creative contribution, technological contribution, capital investment, cost, risk, and contribution to the opening of new markets for creative expression and media for their

communication." With no other actual copyright owners or authors left to participate, who will argue for the independent sound recording copyright owner, singer and author?

GEO is the copyright owner of many master sound recordings protected under §106 and §114 of the Copyright Act, but they are sound recordings I authored, created, produced, financed, and performed on as a singer, background singer and musician - the same categories SoundExchange collects royalties for. Again, see the attached link to GEO's published master sound recordings under a direct license with Apple on iTunes for the past 5 years.[2]

Under the compulsory licenses for sound recordings found in 37 C.F.R. § 385 Subparts B and C and the subsequent statutory rate that flows from these compulsory licenses, GEO represents the interests of every individual American §114 copyright owner and author, in addition to my own sound recordings, which also qualifies GEO as having a significant interest.

ARGUMENT

In their motion, the Services accurately provided the *description* they claimed GEO did not provide when the Services quoted GEO's Petition to Participate, submitted February 1, 2016, that GEO is ""an individual American singer-songwriter, independent label owner, copyright creator, and owner of exclusive rights" for 30 years." So, my description was clearly provided in my Petition to Participate as a copyright owner, singer, and independent label owner — all with significant interests in creating, performing, and owning §114 analog and digital sound recording copyrights, protected under §106 and §114 of the Act. I create what SoundExchange collects.

Furthermore, GEO could not have been clearer in the provided information in his petition description as "an individual singer and independent §114 sound recording creator."

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[2] https://itunes.apple.com/us/artist/george-johnson/id2983224

Also as significant as GEO being a copyright owner, since this SDARS rate proceeding is to set the rates and terms for the compulsory license and statutory rate for a significant percentage of American copyright owners, then that alone should qualify as a significant interest since there is no other participant representing the pro-copyright author or copyright creator, with all due respect to my friends at SoundExchange[3] who unfortunately have never created or owned a music copyright like GEO.

The only requirement that I am aware of to participate in a Copyright Royalty Board rate proceeding is to be a copyright owner or author for the copyright section the rate proceeding is segmented into. In this case, my original sound recordings protected under §106 and §114.

On Page 5 of the Services' motion, they state that "the Librarian observed that entities who have a significant interest include: (i) a copyright owner whose works are being used under a statutory license:" The Librarian does not specify which statutory license, and GEO's sound recordings are currently being licensed by Apple and Google Play under the statutory license in § 385.

How did GEO participate in and complete the entire *Web IV* rate proceeding under §114, with no deals with any of the participants, yet nobody raised the issue that being a copyright owner or creator disqualified me from being a *bona fide* rate participant?

So, SiriusXM in particular is now trying to say that they missed this in *Web IV*, that GEO, by simply being a §114 copyright creator should have disqualified him from *Web IV*?

If GEO had no deals with any of the other §114 participants in *Web IV* from 2014 to 2016, what is different in this §114 SDARS hearing that the Services are now claiming?

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[3] Despite rumors of a rare, live coffee house sound recording made by the duo of "Huppe and Rushing", but this is still unconfirmed.

It is only now, with the introduction of Mr. Bruce Rich to the SiriusXM legal team, that the Services now argue that GEO and all other copyright owners do not have a right to propose rates and terms in any CRB hearing, only licensees can propose their own terms with no competition from property owners. Mr. Rich is also attempting to have my arguments or me removed from the appeal in the USCA for *Web IV*, so this just seems like more of the same procedural tactics to avoid arguing the issues. Mr Rich is arguing against copyright owners, against exclusive rights, against artists, against AFTRA singers, against AFM studio players, and against independent American record labels, which is what Mr. Rich and others will be forced to do if Your Honors allow GEO to stay and argue on behalf of copyright owners.

Most importantly, in Your Honors' September 1, 2016 Order Denying Copyright Owners' Motion to Dismiss the Petition to Participate of Sony Music Entertainment, you seemed to touch on some general definitions and background in the record with the House of Representatives that a "copyright owner" is considered to have a significant interest in any rate proceeding and already having license is not a requirement.

Furthermore, it appears to GEO that the entire purpose of these rate hearings is to make deals, whether voluntarily or by Your Honors' Final Determination.

While some of Your Honors' quotes from your Order below relate to the Subpart B free promotion in §385.14 and other sections, it seems that the background provided in your Order shows the House of Representatives is clear that *copyright owners* have a general significant interest in all rate proceedings, and in GEO's argument, especially ones that set a statutory rate. While the Services may or may not have referred to any of the same authorities as the Copyright Owners did to Sony Music Entertainment ("SME"), the underlying background Your Honors

offer in your Order seems similar to this case as in a *de minimis* level of use to qualify as a "significant interest" or meeting a certain threshold. (underlining added)

> The Judges also do not find persuasive Copyright Owners' argument that SME has asserted only a *de minimis* level of use of the Subpart C locker service rate provision. As the Judges noted *supra* regarding the Subpart B promotional issue, Copyright Owners do not refer the Judges to any authority that suggests a participant must meet a certain threshold of use in order for its otherwise undisputed financial interest to qualify as a "significant interest."
>
> Second, the Judges reject Copyright Owners' assertion that SME cannot establish a "significant interest" because it has not specified the number of times it has utilized Subpart B's zero promotional rate. Copyright Owners do not point to any authority that requires a participant to provide detailed information regarding the extent to which it has used a license in order for that participant to demonstrate its "significant interest" in the proceeding.
>
> Therefore, SME, as a record company that utilizes promotions that implicate § 385.14, has a "significant interest" sufficient to permit its participation in the Subpart B aspects of this proceeding.
>
> However, the phrase "significant interest" is not defined in the Act or in the Judges' regulations. The Judges therefore look, as they have on previous occasions, to the pertinent legislative history, to determine whether that history provides useful guidance.
>
> The House Report identifies such stakeholders with the requisite "significant interest" as including, *by way of example rather than as an exhaustive list,* copyright owners, copyright users, and entities involved in the collection and distribution of royalties. *Id.* Nothing in any other portion of the legislative history indicates that Congress intended these examples to comprise the entire universe of entities with a "significant interest" that would permit them to participate in royalty rate-setting proceedings.

ARE THE SERVICES BEING ANTI-COMPETITIVE BY DENYING GEO A DEAL?

The Services seem to be saying if GEO doesn't currently have a deal with us, then he doesn't have a significant interest. Well, this doesn't seem true if GEO was allowed in *Web IV* and then apparently the only way I would qualify to stay in Phonorecords III is because I have a deal with Apple and Google Play, not because I own and create copyrights protected under §115 of the Act, or sound recordings under §114 in this SDARS hearing.

The Royalty Logic, Inc. ("RLI") argument also fails since the Services try and compare GEO to RLI is not fair or even the same — I am an author and copyright owner and a rate participant, RLI is a collector of royalties that was not a participant. RLI seems to be only commenting on a rate settlement submitted to the public for notice and comment, so RLI wasn't even a participant or a copyright owner.

Recently, I asked Mr. Todd Larson in this proceeding if SiriusXM was open to doing independent deals and he said that SiriusXM had a independent licensing program, so to deny GEO the same deal they offer other independent licenses seems extremely anti-competitive and therefore anti-trust, but that is a whole other motion and argument. Mr. Larson also informed me today that all rates for SiriusXM are confidential and non-public, so that also makes it difficult for GEO to set a per-play rate in this proceeding just in case Your Honors decide on per-play terms, like in *Web IV*.

The Services also attempt to claim, that like David Powell, GEO also failed to state any grounds upon which the Judges could conclude that he had any interest, which the Services know is not true in my case. Any comparison to my Petition to Participate and Mr. Powell's are unfair and again, I did give a description of my significant interest as a copyright owner.

To also belittle my rate proposal as philosophical is also ridiculous, especially when that is not the case and when no Written Direct Statements have been filed.

Just like SoundExchange, GEO is representing the interests of AFM[4] studio players and AFTRA[5] background singers, in this case the legendary Jordanaires.[6]

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[4] See *Web IV* Exhibits GEO2898A, B, and C. AFM receipts

[5] See *Web IV* Exhibits GEO2902, 2903 and 2915 AFTRA receipts

[6] https://itunes.apple.com/us/album/george-johnson-feat.-jordanaires/id527771274

What is most interesting to me is the Services demand to use all songs for an extremely below market rate that us copyright owners have no right to refuse under the compulsory license or statutory rate, yet the Services claim they have a right to refuse copyright owners for any reason, or if they don't like their creative rate proposal options.

It's a compulsory and statutory one way street, especially with no pro-copyright creators and owners left to represent American music creators against only a handful of licensees.

Furthermore, SiriusXM or any of the Services would have no idea if one of my songs as a singer, or copyright owner, or as a songwriter I've done in the past, *or in the future,* will make its way to the Services indirectly.

It's what I want to write, record, produce in the future, not what I did in the past, that concerns me.

In Your Final Determination (March 4, 2016) in *Web IV*, Your Honors ruled that all rates and terms would be based on a 100% per-play royalty rate model ("PPR") and not a percentage of revenue ("POR") model, similar to the grandfathered SDARS POR model in this proceeding. Instead of only one option in determining rates and terms, *Web IV* participants were in fact asked to consider two different models, one based on a PPR model and the other a POR model. So, I didn't mean to scare the Services with my creative suggestion and several proposals, but they were only preliminary and not my final Written Direct Statement.

Instead, if the Services would like to speak about creative solutions, GEO would be happy to do so, but it seems like they have taken an anti-competitive stance and have closed all doors to any rates that are not their current ones — which nobody will tell me what they are, so it's a little tough to suggest a rate. The information gap is alive and well.

CONCLUSION

GEO has a significant interest in this proceeding as a copyright owner and author, protected by §106 and §114 of the Act, and under the compulsory license which sets the statutory royalty rate as the only pro-copyright participant-creator-owner in this proceedings. GEO respectfully asks Your Honors to DENY the Services motion to dismiss GEO's petition. Thank you.

Dated: Tuesday, September 20, 2016

Respectfully submitted,

By: */s/ George D. Johnson*

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CERTIFICATION OF SERVICE

I, George D. Johnson, ("GEO") an individual singer and sound recording copyright creator, hereby certify that a copy of the foregoing GEORGE JOHNSON'S (GEO) OBJECTION AND MOTION TO DENY SERVICES' MOTION TO DISMISS GEO FROM THIS PROCEEDING has been served this 20th day of September, 2016 by electronic mail upon the following parties:

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